

§551.211

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\$27.63 an hour. In addition, these exemptions apply only to computer employees whose primary duties consist of:

(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

(c) *Computer manufacture and repair.* The exemption for employees in computer occupations does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations as identified in paragraph (b) of this section, are also not exempt computer professionals.

(d) *Executive and administrative computer employees.* Computer employees within the scope of this exemption, as well as those employees not within its scope, may also have executive and administrative duties which qualify the employees for exemption under this subpart. For example, systems analysts and computer programmers generally meet the duties requirements for the administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the organization or the organization's customers. Similarly, a senior or lead computer programmer who manages the work of

two or more other programmers in a customarily recognized organizational unit, and whose recommendations regarding the hiring, firing, advancement, promotion, or other change of status of the other programmers are given particular weight, generally meets the duties requirements for the executive exemption. Alternatively, a senior or lead computer programmer who leads a team of other employees assigned to complete a major project that is directly related to the management or general business operations of the employer or the employer's customers generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

§551.211 Effect of performing different work or duties for a temporary period of time on FLSA exemption status.

(a) *Applicability.* Performing different work or duties for a temporary period of time may affect an employee's exemption status.

(1) *When applicable.* This section applies only when an employee must perform work or duties that are not consistent with the employee's primary duties for an extended period, that is, for more than 30 consecutive calendar days—the “30-day test.” The period of performing different work or duties may or may not involve a different geographic duty location. The exemption status of an employee temporarily performing different work or duties must be determined as described in this section.

(2) *When not applicable.* This section does not apply when an employee is detailed to an identical additional position as the employee's position or to a position at the same level with the same basic duties and exemption status as the employee's position.

(b) An agency generally may not change an employee's exemption status based on a snapshot of the employee's duties during a particular week, unless the week involves emergency work under paragraph (f) of this section. An agency must:

(1) Assess an employee's temporary work or duties over a reasonable period

of time (the 30-day test), compare them with the primary duties upon which the employee's exemption status is based, and determine the employee's exemption status as described in §§ 551.203 through 551.210; and

(2) Ensure that it does not avoid reassessing, and perhaps changing, an employee's exemption status by breaking up periods of temporary work or duties with periods of having the employee perform his or her regular work or duties. For example, an agency may not assign exempt employees to perform nonexempt work or duties for 29 consecutive calendar days, return them to their exempt duties for two or three days, then assign them again to perform nonexempt work for another 29 days.

(c) Aggregation of more than 30 non-consecutive calendar days over an extended period does not meet the 30-day test and may not be used to change an employee's exemption status. For example, if an exempt employee performs nonexempt duties 4 days in one week, 2 days in the following week, and so on over a period of weeks or months, the days of nonexempt work may not be aggregated for the purpose of changing the employee's exemption status.

(d) *Effect on nonexempt employees.* (1) A nonexempt employee who must temporarily perform work or duties that are different from the employee's primary duties remains nonexempt for the entire period of temporary work or duties unless both of the following conditions are met:

(i) The period of temporary work or duties exceeds 30 consecutive calendar days; and

(ii) The employee's primary duties for the period of temporary work are exempt as defined in this part.

(2) If a nonexempt employee becomes exempt under the criteria in paragraph (d)(1) of this section:

(i) The employee must be considered exempt for the entire period of temporary work or duties; and

(ii) If the employee received FLSA overtime pay for work performed during the first 30 calendar days of the temporary work or duties, the agency must recalculate the employee's total pay retroactive to the beginning of that period because the employee is no

longer entitled to the FLSA overtime pay received but may be owed title 5 overtime pay, or its equivalent.

(e) *Effect on exempt employees.* (1) An exempt employee who must temporarily perform work or duties that are different from the employee's primary duties remains exempt for the entire period of temporary work or duties unless both of the following conditions are met:

(i) The period of temporary work or duties exceeds 30 consecutive calendar days; and

(ii) The employee's primary duties for the period of temporary work are not exempt as defined in this part.

(2) If an exempt employee becomes nonexempt under the criteria in paragraph (e)(1) of this section:

(i) The employee must be considered nonexempt for the entire period of temporary work or duties; and

(ii) If the employee received title 5 overtime pay, or its equivalent, for work performed during the first 30 consecutive calendar days of the temporary work or duties, the agency must recalculate the employee's total pay retroactive to the beginning of that period because the employee may no longer be entitled to some or all of the title 5, or equivalent, overtime pay received but may be owed FLSA overtime pay.

(f) *Emergency situation.* Notwithstanding any other provision of this section, and regardless of an employee's grade or equivalent level, the agency may determine that an emergency situation exists that directly threatens human life or safety, serious damage to property, or serious disruption to the operations of an activity, and there is no recourse other than to assign qualified employees to temporarily perform work or duties in connection with the emergency. In such a designated emergency:

(1) *Nonexempt employee.* A nonexempt employee remains nonexempt whether the employee performs nonexempt work or exempt work during the emergency; and

(2) *Exempt employee.* The exemption status of an exempt employee must be determined on a workweek basis. The

exemption status determination of exempt employees will result in the employee either remaining exempt or becoming nonexempt for that workweek, as described in paragraphs (f)(2)(i) and (f)(2)(ii) of this section.

(i) *Remain exempt.* An exempt employee remains exempt for any workweek in which the employee's primary duties for the period of emergency work are exempt as defined in this part.

(ii) *Become nonexempt.* An exempt employee becomes nonexempt for any workweek in which the employee's primary duties for the period of emergency work are nonexempt as defined in this part.

§ 551.212 Foreign exemption criteria.

Foreign exemption means a provision of the Act under which the minimum wage, overtime, and child labor provisions of the Act do not apply to any employee who spends all hours of work in a given workweek in an exempt area.

(a) *Application.* When the foreign exemption applies, the minimum wage, overtime, and child labor provisions of the Act do not apply to any employee who spends all hours of work in a given workweek in an exempt area. When an employee meets one of the two criteria in paragraph (b) of this section, the foreign exemption applies until the employee spends any hours of work in any nonexempt area as defined in § 551.104.

(b) *Foreign exemption applies.* If an employee meets one of the two following criteria, the employee is subject to the foreign exemption of the Act and the minimum wage, overtime, and child labor provisions of the Act do not apply:

(1) The employee is permanently stationed in an exempt area and spends all hours of work in a given workweek in one or more exempt areas; or

(2) The employee is not permanently stationed in an exempt area, but spends all hours of work in a given workweek in one or more exempt areas.

(c) *Foreign exemption does not apply.* For any given workweek, the minimum wage, overtime, and child labor provisions of the Act apply to an employee permanently stationed in an exempt

area who spends any hours of work in any nonexempt area. For that workweek, the employee is not subject to the foreign exemption, and the agency must determine the exemption status of such an employee as described in paragraphs (c)(1) and (c)(2) of this section. The foreign exemption does not resume until the employee again meets one of the criteria in paragraph (b) of this section.

(1) *Same duties.* If the duties performed during that workweek are consistent with the primary duties of the employee's official position, the agency must designate the employee the same FLSA exemption status as if the employee were permanently stationed in any nonexempt area.

(2) *Different duties.* If the duties performed during that workweek are not consistent with the primary duties of the employee's official position:

(i) The agency must first designate the employee the same FLSA exemption status as the employee would have been designated based on the duties included in the employee's official position if the employee was permanently stationed in any nonexempt area; and

(ii) The agency must determine the employee's exemption status for that workweek by applying § 551.211.

(d) *Resumption of foreign exemption.* When an employee returns to any exempt area from performing any hours of work in any nonexempt area, the employee is not subject to the foreign exemption until the employee meets one of the criteria in paragraph (b) of this section.

§ 551.213 Exemption of employees receiving availability pay.

The following employees are exempt from the hours of work and overtime pay provisions of the Act:

(a) A criminal investigator receiving availability pay under § 550.181(a) of this chapter, as provided in 29 U.S.C. 213(a)(16));

(b) A pilot employed by U.S. Customs and Border Protection or its successor who is a law enforcement officer as defined in section 5541(3) of title 5, United States Code, and who receives availability pay under section 5545a(i) of title 5, United States Code.